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RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte Thomas Powers

Appeal 2008-4531
Application 10/677,582
Technology Center 2178

Oral Hearing Held: Thursday, November 6, 2008

Before TERRY J. OWENS, PETER F. KRATZ and KAREN M. HASTINGS, Administrative Patent Judges

ON BEHALF OF THE APPELLANT:

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The above-entitled matter came on for hearing on Thursday, November 6, 2008, commencing at 1:48 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, 9th Floor, Alexandria, Virginia, before Jennifer M. O'Connor, Notary Public.

THE CLERK: Calendar number 28, Mr. Leipold.

MR. LEIPOLD: Hello. I have Ashley Johnson with me -- he's with Multisorb -- for the hearings.

If it please the board, I want to start by just a brief discussion of what the invention was from our view. The invention is drawn to a narrow oxygen absorber, also H_20 absorber, that is directed to use in a container where it is in an impermeable -- I mean it's a permeable package, but has very low water permeability, but reasonably high oxygen permeability, so it's designed for -- so that the material will absorb a lot of oxygen before it absorbs much water and loses its effectiveness. This is, I believe, the bridge in paragraph seven and eight in the spec.

The invention provides for storing at low humidity materials that are both water sensitive and oxygen sensitive, primarily oxygen sensitive, because they -- drugs and things, you want to get the oxygen out fast and this material will do that. It's designed to function in a barrier envelope. It's not designed to be just by itself in a product. It finds its best use in the barrier envelope of where it can absorb the oxygen fast and the water slower.

The next thing I wanted to discuss is the claim. The claim specifies several things. It specifies the composition of -- the entire composition has 10 to 20 percent weight of water and then there is a solution of humectant salt and electrolyte salt, which may be the same thing, and this solution is characterized by a water activity of below 0.6.

Now the water, the salt solution, is combined with a water-binding carrier and at least one oxygen-reducing agent blended with a mixture, normally iron. So before I get to a discussion of the art, there is a -- I was thinking how to sort of explain what my view of this thing was altogether, our view. I don't know if you remember the movie Forrest Gump, but he said -- I can't do the Forrest Gump imitation -- but he says, when you pick a -- one of the chocolates out of the box, you never know what you're going to get.

And here I think it's more like there's somebody who had a box of chocolates and he wanted say the nugget with a raspberry jelly on top of it. He had the whole box there and there's one there, so he started digging in and he found nugget chocolate. He found nugget with strawberry. He found nugget with caramel. He found raspberry, but -- and then pretty soon he starts breaking them apart and sure enough, there's no nugget with raspberry filling.

To me, it's a little -- how that relates to this rejection is that to me, it's something like the examiner had this group of patents. He has what, three patents, rejected seven -- seven different rejections. He's found all the ingredients in there. He's got salts. He's got carriers. He's got water. He's got iron. I think all of them have iron. And he found all these pieces, but I don't think he found exactly the one he wanted, exactly the one that meets our claim. So that's that, although superficially, you'd think -- think it's there, but it's not.

I'd like to just briefly discuss each of the references with respect to the claim. The first one is *Saari* -- *Suri*, *Saari*, I guess it is. This is drawn to a food preservative. It really talks about releasing water more than it talks about absorbing water. It wants -- like I say, it notes high water activity in column five, whereas we keep the H_20 absorption low so that oxygen can be absorbed rapidly.

JUDGE OWENS: How about column four, line 66 that the examiner relies upon, humidity levels between 20 and 29 percent, 29 using calcium chloride, which is one of the appellant's salts?

MR. LEIPOLD: There is a suggestion there that that is the material, but there's no suggestion as to how to use it. Do you use it and form a solution with 10 to 20 percent water? What's the humidity? Is the thing below .6?

JUDGE OWENS: It would be below -- it would be -- the humidity level would be .29, wouldn't it?

MR. LEIPOLD: Well, it depends on what it's talking about there. Is it talking about the solution of the salt in water, or is it talking about the entire material? Even there they talk about you can blend it with different materials and you get different relative humidities, in the next page. And so I don't think it's really a teaching that would be on all fours with what we have in that there's not enough disclosure there. There's no teaching that it's going to be mixed with water and then applied to a carrier material and what the properties of that carrier material are.

JUDGE OWENS: It seems to be indicating that the composition is going to have a humidity level of -- provide a humidity level of .29.

MR. LEIPOLD: Is that -- well, I mean it's not clear whether it's the composition, whether it's the composition in water, whether it's the compensation absorbed onto something; it's just the composition has that.

JUDGE OWENS: And then we have at the top of column eight the preferred range of solubility is 25 to 80. The examiner relied upon that as corresponding to your 20 percent water.

MR. LEIPOLD: But are these materials that are -- I mean, it's met the .6 limitation, but has it met the other limitations in the claim?

JUDGE OWENS: Like what?

MR. LEIPOLD: The 10 to 20 percent water.

JUDGE OWENS: That's what the examiner relied upon at column eight, first two lines; 80 percent solubility is 20 percent water.

MR. LEIPOLD: He's found another piece of the -- he's found another piece, although they never find the .6, below .6. But they found another piece of the puzzle, but there's no teaching to combine that thing at the bottom of column, what was it, column four, with these later teachings in column eight with the thickener materials.

JUDGE OWENS: They teach at column three, line 31, line 32, the solution further includes the gel forming materials in addition to the salt and the water and at column -- line 46, column three, oxygen-scavenging material, which is the iron. So it looks like maybe they do have all the components suggested together.

MR. LEIPOLD: They do have all the components. I'm not saying they don't have the components, although I think it's questionable whether these alginate material -- or these vegetable gum materials are really equivalent to the language of the claim, which has a water-binding carrier. In fact, these materials don't really bind water very well. They tend to leak. There's a disclosure in there that they have to put them in a sealed thing so that they don't leak water, that these things are -- whereas the claim has a water-binding carrier.

I think that those gums are doubtful as binders. This by and large that while you can find the pieces -- you know, several pieces and numbers of the invention, this reference teaches away from it. It wants to release water.

JUDGE OWENS: Your carriers that you disclose in the spec include a gelling agent?

MR. LEIPOLD: Excuse me, I didn't get --

JUDGE OWENS: On page eight of your spec, the carriers that are disclosed include a gelling agent, synthetic silicates and the reference uses --

MR. LEIPOLD: Yeah, silicon's in there.

JUDGE OWENS: Silicate. Looks like some of them are the same.

MR. LEIPOLD: Yeah, gelling agents are there, but that's not necessarily the same as those other materials, like your silica gel, which is clearly within this -- within our spec. But it's not the same as the vegetable gels that he has.

But *Saari* is heading entirely in a different direction than where our invention is in that you'd have to make changes and selections to reach a product that is not what is intended by *Saari*. *Saari* wants the wet product in effect, and we want the dry product. But there's no teaching to use low humidity levels in any way, really, except that one thing that says hey, those materials have properties and much less would hold water.

JUDGE OWENS: By low humidity level, are you referring to your water activity below --

MR. LEIPOLD: Yeah, I was referring to that, the water activity thing, yeah.

Anything else on *Saari*? The next -- I haven't dealt with 102 because to me, the 102 questions, it's just these numbers don't appear there, so to me, you can't have a 102 rejection without having it on all fours and I just don't think it is.

But the next thing, the *McKedy* patents, *McKedy* patents are closely related there. One's a CIP of the other one. The example three I think that the examiner refers to, I think is the same. If you go back to our claim, in our claim you mix -- you have the solution. You mix that into the carrier. *McKedy* seems to indicate that any mixing is okay, any style of mixing.

JUDGE OWENS: It sounds like *McKedy* 375, he says at column three line 53, the salt can be added to the silica gel by dissolving it in water before being added to the silica gel.

MR. LEIPOLD: I'm sorry, I missed the column you're on.

JUDGE OWENS: Column three, line 53.

MR. LEIPOLD: Column three, line 63.

JUDGE OWENS: Fifty-three.

MR. LEIPOLD: Fifty-three.

JUDGE OWENS: The salt can be added to the silica gel by dissolving it in water before being added to the silica gel. So isn't that --

MR. LEIPOLD: That is the same.

JUDGE OWENS: Same. That's the same?

MR. LEIPOLD: Yeah, that is the same, but he also says he can do it other ways. There's just no -- there's no reason to select that, which is to me, to meet the claim, plus make changes to reach our other things, you know, that this is basically drawn to oxygen, the oxygen absorption. It doesn't have the .6 water activity. The water percentage is not entirely clear.

JUDGE OWENS: Why would you say the water activity would be above .6?

MR. LEIPOLD: I don't know. I would say you can't tell, but if you want to say it's above, that's fine.

JUDGE OWENS: Well, the examiner seemed to argue that it was particulate and that it therefore would have water activity below .6. I don't recall any specific --

MR. LEIPOLD: I'm not sure where you get to that, why -- I'm not sure what that argument means, I guess.

JUDGE OWENS: Did you say that in your brief?

MR. LEIPOLD: I don't remember. Anyway, to summarize our view on the *McKedy* patents is, there's no activity given, no relation to the 10 to 20 percent water with salt mixture that is then brought into contact with the water-binding carrier, that that's one of several ways of doing it. The examiner has deemed -- this is the one where the examiner deemed things to be the same, but really hasn't given any teaching why that's so, I don't think.

It's not -- and ours is designed to be used at low humidity and this wasn't again. This was designed basically for oxygen absorption, so that the amendment to modify this one to reach our invention is not -- there's no suggestions.

Anything else on either *McKedy*?

JUDGE OWENS: No.

MR. LEIPOLD: The next one is *Waterman*. *Waterman* is -- well, I think it's the weakest of the references. It's another oxygen absorber. It's not clear it has salt. It depends on how they interpret it, how he -- you know, I kind of thought it did, but the examiner really is not too clear.

JUDGE OWENS: What do you consider to be salt?

MR. LEIPOLD : I was -- I would think this is the one. Let's see, I sometimes get these things, but I was thinking -- let's see, he's got the carrier there. Where did I see salt? I thought I saw salt here somewhere. I think he's getting salt from that other patent that he cites, that third one there.

JUDGE OWENS: It says in *Waterman* at paragraph 21, about two inches down, an accelerator may be -- also be incorporated, such as metallic iodide, or bromide. So that would be our salt?

MR. LEIPOLD: I think that's what the examiner's alleging.

JUDGE OWENS: So what are we missing?

MR. LEIPOLD: Well, I think what we're missing is that this thing doesn't -- there's really no suggestion in that reference that to do what he wants to do -- he listed as an accelerator, not as a humectant salt, not as electrolyte, not even as an absorbent for anything.

JUDGE OWENS: If it's the same material, wouldn't it have the same property?

MR. LEIPOLD: Right, but does -- there's nothing to teach that you're going to put this material in with 10 to 20 percent water and that you're going to have it there with the water activity of 0.6. It's just that vague question as to metallic iodide or bromide, which may not even be a salt.

But we have the iron. We have silicas there, which is our carrier. But it's certainly not -- to me it's a stretch to say that you can put that in and then you would have it with 10 percent water, 10 to 20 percent water -- and by the way, that solution would have 0.6 water activity -- that it's hard to find it in there. That's my story of the chocolates; that it's got all the pieces, but it's hard to find them put together right.

So my argument is that if the examiner -- you know, the examiner has a duty to show the terms of the claim. The examiner can't just find pieces of the claim and say hey, it would be obvious to put them together, be obvious to take 20 -- 10 to 20 percent water, maybe it's there. It would be obvious to have 0.6 water activity. Maybe that's there.

I think the examiner's duty is to do more than that, to give a teaching that -- to give a statement that I could -- that the applicant could deal with as far as to better argue. I mean, there's really no -- that while these things got the materials, I don't believe they have 10 to 20 percent water solution of the salt and the -- you know, having that water activity problem that is then mixed with the water binder, water-binding carrier and the oxygen-reducing agent, I think that there's no teaching in these.

Thank God they weren't combined, but then in these seven rejections that he's got here, I don't think there's a teaching of what the invention is. I think we're novel and non-obvious.

JUDGE OWENS: Any questions? No questions.

JUDGE HASTINGS: Thank you.

MR. LEIPOLD: Thank you.

Whereupon, at 2:08 p.m., the proceedings were concluded.